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No. 01-937

Supreme Court, U.S.
FILED
FEB 1 2002
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IN THE

Supreme Court of the United States

KARIN SKOLD VAN SLYKE,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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February 1, 2002

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QUESTION PRESENTED

Whether the Court of Appeals erred in finding that Northrop Grumman has set forth a legitimate non-discriminatory reason for not promoting Petitioner to a Code 36 in 1997.

RULE 29.6 STATEMENT

Northrup Grumman Corporation is a publicly held corporation, but does not have any publicly held parents, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE COURT OF APPEALS' DECISION DID NOT DEPART FROM EEO JURISPRUDENCE OR CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS	5
A. The Factual Record Demonstrates That All Of The Promotion Decisions Relevant To This Case Were Based On Job Related Performance Qualifications	5
B. Van Slyke's Petition Ignores The Lower Courts' Thorough Legal Analysis And Relies On Inapplicable Case Law	7
1. The Lower Courts Examined Northrop Grumman's Motivation As Part Of Its Burden-Shifting Analysis And Van Slyke Presented No Evidence To Override The Company's Legitimate Non-Discriminatory Reason	7
2. The Lower Courts Had No Obligation To Consider Van Slyke's Cited "EEO Jurisprudence."	8
a. The "after-acquired" evidence cases do not apply to this matter	10
b. The "lack of information" cases also do not apply to this matter	11

TABLE OF CONTENTS—Continued

Page

II. VAN SLYKE CANNOT OBTAIN SUPREME COURT REVIEW OF HER ALLEGED "EVIDENCE" OF PRETEXT 12

III. VAN SLYKE PRESENTS NO BASIS FOR SUPREME COURT MONITORING OF THE FOURTH CIRCUIT 13

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	8
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1984)	9
Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998)	11
Equal Employment Opportunity Commission v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990)	9
Evans v. Technologies Applications & Servs. Co., 80 F.3d 954 (4th Cir. 1996)	3
Hill v. Seaboard C.L.R. Co., 767 F.2d 771 (11th Cir. 1985)	9
Joshi v. Florida State University Health Ctr., 763 F.2d 1227 (11th Cir. 1985)	9
Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985)	9
Mardell v. Harleysville Life Insurance Co., 31 F.3d 1221 (3d Cir. 1994)	9, 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	7
McKennon v. Nashville Banner Public Co., 513 U.S. 352 (1995)	8-9, 10
Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001)	10-11
Nanty v. Burrows Co., 660 F.2d 1327 (9th Cir. 1981)	9
Nguyen v. Dalton, 519 U.S. 1045 (1996)	13
Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726 (1998)	10
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	3, 12
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	8, 12

TABLE OF AUTHORITIES—Continued

	Page
Rowe v. Marley Co., 233 F.3d 825 (4th Cir. 2000)	12
Russell v. Microdyne Corp., 65 F.3d 1229 (4th Cir. 1995)	8, 11
Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990)	9, 10
St. Marys Honor Ctr. v. Hicks, 509 U.S. 502 (1993)	8
Taylor v. Virginia Union University, 528 U.S. 1189 (2000)	13
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	8
Young v. Lehman, 748 F.2d 194 (4th Cir. 1985)	7
OTHER	
Supreme Court Rule 10	12

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent, Northrop Grumman Corporation, develops and produces sophisticated electronic systems for the nation's defense, civil aviation and other domestic and international applications. Petitioner Karin Skold Van Slyke was an engineer with Northrop Grumman for twenty-two years, the last three with the Advanced Radar and Avionics Department. During her tenure, prior to her voluntary resignation, Northrop Grumman promoted Van Slyke at least four times, and she advanced from an entry level engineer in the Graduate Student Program to a project management position at grade level "Code 35." Van Slyke brought this action because she did not advance to a "Code 36" program management position in 1997, and three men received such a promotion, allegedly in preference to her.

Despite her present suggestion, Van Slyke **did not seek** the specific Code 36 positions awarded to the three men she identified in discovery as her "comparators." She sought promotion to a Code 36 generally. Northrop Grumman did not promote Van Slyke to a Code 36 because she failed to demonstrate adequate qualifications for a management code in performing her own job assignments. The promotion of three men to Code 36 positions did not affect her promotional opportunities in any way. Nor did Van Slyke's failure to receive a Code 36 upgrade in 1997 adversely affect her promotion potential any time thereafter.

At senior management levels, Northrop Grumman does not employ a competitive promotion system for a grade level assignment based on comparisons of contenders for a set number of managerial positions. Rather, the grade level assigned to a particular position depends on the nature of the work performed and its associated degree of responsibility. The Company predicates selection for its higher management grades, such as Code 36, on whether an employee has "earned" the higher wage rate, by demonstrating sustained, superior performance and proven management ability in a particular job assignment. The Company thus reviews individual employees for promotion in the general context of their qualification for and contribution to a specific job, but not based upon one-to-one comparisons of employees.

As detailed by the lower courts, Van Slyke had at least two opportunities to demonstrate the level of performance required for upgrade to Code 36, in jobs she undertook in consultation with her managers to "earn" her promotion. She chose to withdraw from both of those positions, rather than complete the demanding work required for the desired promotion.

Although the Company did not engage in a one-to-one comparison of Van Slyke to the three men whom she identifies as comparators, she relies on the Company's promotion

of these three men into unrelated positions as evidence of gender discrimination. Van Slyke, however, adduced no evidence regarding the three comparators and admitted in discovery that she did not know the jobs held by any one of them at the time of their promotions or the duties required of even one of the three positions. Van Slyke's three male comparators received Code 36 positions because, unlike Van Slyke, they demonstrated the management ability and superior performance necessary for achieving a management code in their respective jobs.

The only rationale that has ever motivated Northrop Grumman's promotion decisions is the qualification of an employee for a senior level position as demonstrated by prior sustained performance **in that job**. There is no record evidence to the contrary. The qualification justification for promotions articulated by Northrop Grumman for the Advanced Radar and Avionic Department, which produces the most technologically sophisticated radar products in the market, is presumptively appropriate and non-discriminatory. *See Evans v. Technologies Applications & Servs. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) ("Job performance and relative employee qualification are widely recognized as valid, non-discriminatory bases for any adverse employment decision."); *see also Patterson v. McClean Credit Union*, 491 U.S. 164, 187 (1989) (finding employee qualifications a legitimate non-discriminatory reason).

Van Slyke's assertion that Northrop Grumman cannot defend its promotions of these three men is factually and legally wrong. First, she ignores the means by which employees earn promotions—by demonstrating management ability and sustained, superior performance in their positions. Second, Van Slyke ignores the fact that Northrop Grumman relied upon the qualifications of these three men for their specific jobs when making the decisions to promote them. Third, there is no evidence that these three promotion

decisions had any bearing on her failure to earn a promotion. To posit the argument as a narrow comparison of "relative qualifications" in which Van Slyke was "admittedly not considered" is an exercise in legal sophistry. The district court and the court of appeals were correct, and summary judgment was granted appropriately.

ARGUMENT

This case involves the application of established law to a discrete set of facts. The district court correctly applied the established law and ruled that there was no dispute of material fact requiring trial and that, on the record, Northrop Grumman was entitled to judgment as a matter of law. The court of appeals accepted and adopted the district court's factual findings and found no error in its legal conclusions. Van Slyke presents no legal issue that warrants review in this Court. There is no conflict among the circuits for this Court to decide. Nor does the outcome of her case depend on an unresolved issue of federal law.

Van Slyke relies on three unpersuasive arguments to support her petition for review: (1) she claims that the court of appeals failed to consider applicable "EEO jurisprudence"; (2) she insists that she presented adequate evidence of pretext; and (3) she maintains that this Court needs to rein in the "parsimonious" Fourth Circuit. None of her arguments present a legitimate basis for this Court to grant certiorari.

The court of appeals had no reason to address the "EEO jurisprudence" concerning pretext cited by Van Slyke. Both the factual record and the thorough legal analysis conducted by the lower courts in this case demonstrate that Northrop Grumman's decision to award a Code 36 to the three male employees was motivated by their respective qualifications for a specific position as demonstrated by sustained performance in their particular jobs. The court of appeals

has not "sanctioned a deviation," (Pet. 14) from established precedent regarding motivation; it has expressly adopted such precedent in **appropriate** cases.

Her second and third arguments likewise provide no basis for review. She presents no legal theory that would permit this Court to overrule the lower courts' assessment of the evidentiary record regarding pretext. In addition, her challenge to the court of appeals' "approach" to anti-discrimination cases is wholly without merit.

I. THE COURT OF APPEALS' DECISION DID NOT DEPART FROM EEO JURISPRUDENCE OR CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS.

Van Slyke argues that the court of appeals departed from this Court's precedent, in conflict with the holdings of five circuit courts, by permitting Northrop Grumman to rely on an explanation—superior qualifications—that "admittedly" did not motivate it at the time the employment decisions were made. Pet. 4. Van Slyke's argument suffers from two fatal flaws. First, the undisputed facts demonstrate that qualifications—demonstrated management ability and superior performance—did motivate Northrop Grumman's promotion decisions. Second, the lower courts analyzed thoroughly the Company's asserted motivations, and Van Slyke's new "EEO jurisprudence" would not alter their legal conclusions in this case.

A. The Factual Record Demonstrates That All Of The Promotion Decisions Relevant To This Case Were Based On Job Related Performance Qualifications.

Van Slyke's petition incorrectly argues that Northrop Grumman's articulated defense (*i.e.*, superior qualifications) was not its true motivation for failing to promote her to a Code 36 because the Company did not consider Van Slyke

for the three specific positions given to her comparators. (Pet. 4-5) This argument glosses over these undisputed facts that demonstrate that Northrop Grumman's articulated defense was its true motivation, regardless of the fact that Van Slyke was not considered for the three specific positions: (1) the comparators received their promotions only after they demonstrated sustained management ability in their respective positions; (2) Northrop Grumman does not predicate consideration for promotion on a competitive promotion system based on comparisons of contenders; (3) promotion requires specific job-related experience and sustained management ability, demonstrated on the job, sufficient to warrant a Code 36; (4) Van Slyke **did not seek** the three positions given to her comparators; (5) Van Slyke never held the jobs assigned to the three comparators, and she could not even identify the jobs; (6) the relevant decision makers repeatedly placed Van Slyke in positions where successful performance would lead to a Code 36; and (7) Van Slyke failed to capitalize on the opportunities presented to her.

These undisputed facts lead to only one conclusion—Northrop Grumman **was motivated** by the qualifications of Van Slyke and her comparators in their respective promotion decisions. Despite Van Slyke's claim, the Company has never "admitted" otherwise. Although Northrop Grumman did not base its promotion decisions on a one-to-one comparison of Van Slyke and her three comparators, it nonetheless was motivated by consideration of the employees' specific qualifications relative to each particular job. Northrop Grumman, therefore, could properly rely upon its asserted defense.

B. Van Slyke's Petition Ignores The Lower Courts' Thorough Legal Analysis And Relies On Inapplicable Case Law.

1. *The Lower Courts Examined Northrop Grumman's Motivation As Part Of Their Burden-Shifting Analysis And Van Slyke Presented No Evidence To Override The Company's Legitimate Non-Discriminatory Reason.*

Van Slyke builds on her incorrect assertion that Northrop Grumman relied upon a rationale that did not motivate its promotion decisions and claims that this Court has not addressed whether an employer may respond to a prima facie case by asserting a "rationale that did not motivate it at the time the decision was made." (Pet. 9) While the error of Van Slyke's assertion itself precludes this argument, in fact, this is not an unsettled area of law. The burden shifting analysis applicable to Title VII matters, first set out by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), directly addresses this issue by requiring a plaintiff to establish the falsity of an employer's stated motivation. Under *McDonnell Douglas* and its progeny, once a Title VII plaintiff meets the "relatively easy" burden of establishing a prima facie case, *Young v. Lehman*, 748 F.2d 194, 197 (4th Cir. 1985), the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory motive for the adverse employment action at issue.

> The defendant *need not persuade the court that it was actually motivated by the proffered reasons.* It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the

> plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (emphasis added and internal citations omitted). The burden then returns to the plaintiff to demonstrate the falsity of the employer's asserted reason, *i.e.*, that the stated rationale did not actually motivate the employer's decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *see also Russell v. Microdyne Corp.*, 65 F.3d 1229, 1235 (4th Cir. 1995) (explaining that in "the pure discrimination case . . . a single reason motivated the challenged decision, the parties offered different reasons, and the fact-finder was required to determine which one of the two stories was true.")

In this case, Northrop Grumman met its burden of production by introducing undisputed evidence of its motivation (*i.e.*, its decision makers relied on job performance and employee qualifications in promoting Van Slyke's three comparators and in failing to promote her). Van Slyke failed to carry her burden to raise a genuine issue of material fact to demonstrate that Northrop Grumman's stated rationale was false—that job related qualifications did not motivate the Company at the time the promotion decisions were made—and that the real reason was gender discrimination. *See Reeves*, 530 U.S. 133; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Both lower courts found that Van Slyke failed to meet her burden. She cannot obtain review here by falsely declaring that Northrop Grumman "admittedly" was not motivated by relative qualifications. The record proves otherwise.

2. *The Lower Courts Had No Obligation To Consider Van Slyke's Cited "EEO Jurisprudence."*

Van Slyke argues that the lower courts' failure to follow the "EEO jurisprudence" set out in *McKennon v. Nashville*

Banner Pub. Co., 513 U.S. 352, 360 (1995), and other circuit court decisions, warrants Supreme Court review of her case. The lower courts, however, had no reason to apply the "EEO jurisprudence" cited by Van Slyke because it simply is inapposite.

The cases cited by Van Slyke fall into two distinct categories. In the first category of cases, the employer asserted, as a basis for an alleged discriminatory employment decision, information learned only after the fact (the "after-acquired evidence" cases).[1] In the second category of cases, the employer could not have compared employee qualifications because either the employer: (1) wrongfully excluded the plaintiff from participation in the hiring/promotion process; or (2) did not know the successful candidate's qualifications at the time it rejected the plaintiff (the "lack of information" cases).[2] Neither category applies here. As evidenced by the undisputed factual record, Northrop Grumman assisted Van Slyke in the promotion process. The Company knew at the time it promoted her three comparators that, although she was a highly regarded engineer, she had stepped back from similar promotion opportunities afforded

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[1] *See McKennon*, 513 U.S. 352; *Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396 (1st Cir. 1990); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part*, 65 F.3d 1072, 1073 (3d Cir. 1995).

[2] *See Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985); *Nanty v. Burrows Co.*, 660 F.2d 1327 (9th Cir. 1981), *overruled on other grounds*, *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996); *Equal Employment Opportunity Comm'n v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Hill v. Seaboard C.L.R. Co.*, 767 F.2d 771 (11th Cir. 1985); *Joshi v. Florida State Univ. Health Ctr.*, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.), *cert. denied*, 465 U.S. 1066 (1984).

to her, and she had no sustained, successful management experience. The lower courts had no reason, therefore, to apply the "EEO jurisprudence" cited by Van Slyke.

a. The "after-acquired" evidence cases do not apply to this matter.

In her petition, Van Slyke, claims, for the first time, that the "after-acquired evidence" cases resulting from this Court's decision in *McKennon v. Nashville Banner Pub. Co.* should have controlled the court of appeals decision in this case. She did not raise this argument in the lower courts and, therefore, she cannot raise the new theory here. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998) (rejecting Sierra Club's argument because it "suffers from the legally fatal problem that it makes its first appearance here in this Court in the briefs on the merits.") Even if these cases were properly before this Court, they do not apply to Van Slyke's appeal.

This is not an "after-acquired evidence" case. Unlike the employers in *McKennon*, *Sabree*, and *Mardell*, Northrop Grumman did not attempt to rely on new information about Van Slyke to justify its earlier employment decision. In stark contrast, Northrop Grumman had all relevant information **at the time** it made the promotion decisions at issue. Northrop Grumman's employment decisions were not motivated by discrimination, but by its assessment of the candidates' sustained, successful management performance. The court of appeals did not depart from this Court's precedent or create a conflict when it did not consider and/or address the after-acquired evidence cases, which Van Slyke never raised in the courts below and which do not apply to the facts here.

Van Slyke's claim that the court of appeals "misunderstands" this line of cases regarding motivation, or that it "has gone astray," is baseless. (Pet. 6) In decisions before this one, the court of appeals expressly adopted and relied upon the after-acquired evidence cases. *See Miller v. AT&T*

Corp., 250 F.3d 820 (4th Cir. 2001) (discussing *McKennon* and finding that the after-acquired evidence rule applied to the specific facts of the case); *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995) (reversing summary judgment for employer where employer relied on "after-acquired evidence" of employee's misrepresentations on her resume to justify its earlier termination decision); *see also Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (Ervin, J., dissenting[3]) (stating that "the pertinent question in anti-discrimination cases is whether the employer was motivated by discriminatory animus at the time of the adverse employment action against the employee.")

b. The "lack of information" cases also do not apply to this matter.

Under this line of argument, Van Slyke relies on a series of cases which reject a relative qualifications defense where the employer at issue either: (1) prevented the plaintiff from participating in the hiring/promotion process and made no valid qualifications-based decision; or (2) did not know of the successful candidate's qualifications when it rejected the plaintiff. Neither circumstance is present here. As the district court held, Van Slyke was fully engaged in the Northrop Grumman promotion process, (Pet. App. B, 17a), and her supervisors were fully aware of her qualifications. *Id.* Indeed, Van Slyke had already failed to prove herself in two assignments before two of her comparators were upgraded. There is no basis on this record for the courts below to have applied either the "after acquired evidence" or "lack of information" lines of authority.

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[3] Circuit Judge Ervin wrote the unanimous opinion in *Russell*, 65 F.3d 1229, reversing the lower court's granting of summary judgment in an after-acquired evidence case. Plaintiff's successful counsel in *Russell* represents the Petitioner in this matter.

II. VAN SLYKE CANNOT OBTAIN SUPREME COURT REVIEW OF HER ALLEGED "EVIDENCE" OF PRETEXT.

Van Slyke's disagreement with the lower courts' assessment of her "evidence" of pretext does not warrant review here. The district court considered all of Van Slyke's evidence and gave her the benefit of all reasonable inferences. Then the court ruled that the quantum of evidence did not satisfy Van Slyke's burden at the pretext stage. Pet. App. B, 21a. On appeal, Van Slyke argued that the district court ignored her "evidence" of pretext. The Fourth Circuit rejected this argument and upheld the district court's evidentiary assessment. (Pet. App. A, 6a-7a) Nevertheless, she continues to insist that she has evidence of pretext that should go to a jury. (Pet. 18)

This Court does not grant certiorari to provide an unsuccessful party with another chance to lay out the facts. Rather, the petitioner must demonstrate that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10. In the present case, the lower courts did not ignore *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989) or restrict Van Slyke's ability to prove pretext. Nor did the district court fail to follow the holding in *Reeves*. The district court considered **all** of Van Slyke's "evidence," and found it insufficient to rebut the stated rationale for Northrop Grumman's employment decisions. Accordingly, neither *Patterson* nor *Reeves* "affect the outcome of this case. Rather, it is [Van Slyke's] failure to demonstrate pretext . . . that dooms [her] claims." *Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000).

III. VAN SLYKE PRESENTS NO BASIS FOR SUPREME COURT MONITORING OF THE FOURTH CIRCUIT.

Finally, Van Slyke argues for Supreme Court review because the Fourth Circuit sometimes takes "a parsimonious approach" to discrimination cases. (Pet. 18) As support for her claim, she cites to five cases where the Supreme Court has reversed the Fourth Circuit. *Id.* Unmentioned is the fact that the Supreme Court has denied certiorari more than 100 times in employment discrimination cases from the Fourth Circuit during the same period. This Court's reversal of a literal handful of Fourth Circuit decisions does not warrant special scrutiny of the Circuit's "EEO jurisprudence."

The instant case involves a simple failure to promote claim. The Supreme Court has refused, without opinion, to review the Fourth Circuit's decisions in similar cases. *See e.g.*, *Taylor v. Virginia Union Univ.*, 528 U.S. 1189 (2000) (denying review of Fourth Circuit decision rejecting, *inter alia*, plaintiff's gender discrimination failure to promote claim); *Nguyen v. Dalton*, 519 U.S. 1045 (1996) (denying review of Fourth Circuit decision rejecting plaintiff's age, gender, race and national origin failure to promote claim). This Court should likewise deny Van Slyke's petition for certiorari and reject her baseless attack of the Fourth Circuit's handling of discrimination cases.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 1, 2002